United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1249

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
ALVIN BLASSINGAME,

Petitioner-Appellant,

-against-

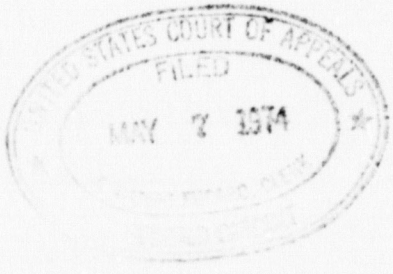
THE HONORABLE LOUIS GENGLER,
Warden,
Federal House of Detention,

Respondent-Appellee.

Docket No. 74-1249

BRIEF FOR PETITIONER-APPELLANT PURSUANT TO ANDERS v. CALIFORNIA

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DENYING A PETITION FOR WRIT OF HABEAS CORPUS



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. ALVIN BLASSINGAME, Petitioner-Appellant, -against- THE HONORABLE LOUIS GENGLER, Warden, Federal House of Detention, Respondent-Appellee.	Docket No. 74-1249

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QUESTION PRESENTED

Whether there are any non-frivolous issues to be presented for appeal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) entered January 16, 1974, denying a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2255.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was continued* as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

On December 21, 1974, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of New York on the ground that he had been in federal custody since July 3, 1973, based on an arrest warrant issued for violation of the terms of his parole, without ever having been afforded a parole revocation hearing.

There is no dispute as to the relevant facts.** On

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*United States Magistrate Sol Schreiber assigned The Legal Aid Society, Federal Defender Services Unit on November 21, 1973, to represent petitioner at his parole revocation hearing.

**Judge Carter decided the case without a hearing based on affidavits submitted by both sides.

September 2, 1963, petitioner was sentenced by The Honorable Lloyd F. MacMahon, in the United States District Court for the Southern District of New York, to an indeterminate term of imprisonment pursuant to 18 U.S.C. §5010(b) of the Youth Corrections Act, pursuant to a conviction for mail fraud. Petitioner was released on parole on July 10, 1972, and placed under the supervision of the United States Probation office in the Southern District of New York.

Thereafter, on February 26, 1973, a warrant for petitioner's arrest was issued, based on three alleged parole violations:*

1. arrest on charges of forgery and grand larceny;

2. failure to report the arrest; and

3. failure to appear in court on the charges.

Based on this parole warrant, petitioner was arrested in Miami, Florida, on July 2, 1973, and taken to the Dade County Jail. At the preliminary interview held on July 9, 1973, he requested the assistance of counsel, and proceedings were adjourned until July 26. On the latter date, petitioner appeared with assigned counsel who requested that petitioner be examined by a court-appointed psychiatrist, and proceedings were adjourned pending the results of that examination. On August 15, 1973,

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*On March 19, 1972, the warrant application was supplemented by a fourth violation: failure to submit supervisor reports. The warrant application was again supplemented on April 5, 1973, by two further violations: defrauding an innkeeper, and leaving the district without permission.

the court-appointed psychiatrist, Dr. Albert Jaslow, completed his psychiatric report, concluding that petitioner was not competent to participate in the proceedings and assist in his defense.

Accordingly, on September 27, 1973, petitioner was transferred to the Medical Center for Federal Prisoners at Springfield, Missouri, for further psychiatric examination and evaluation. On October 31, 1973, the Medical Center certified that petitioner was competent to understand and participate in the parole revocation proceedings. However, shortly prior to that date petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Missouri requesting a local parole revocation hearing. During this proceeding, a representative of the United States Attorney's office for the Western District of Missouri made the representation that petitioner would be given a hearing in New York City by November 9, 1973. The petition was dismissed on November 7, 1973, without prejudice, with the direction to the Board of Parole that petitioner be transferred to New York City for a local revocation hearing to be held "within the next few weeks or shortly after November 9, 1973."

Unfortunately for petitioner, the Board of Parole in Washington was never advised* of the Missouri District Court

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*In its memorandum of law submitted below the Government adknowledges that this failure of communication constitutes negligence on the part of the Government. Government's memorandum of law, at 5.

order's contents until after initiation in the Southern District of New York of the proceedings concerned in this appeal.

Petitioner arrived at Federal Detention Headquarters in New York City on November 19, 1973. On November 21, he was brought before United States Magistrate Sol Schreiber, at which time The Legal Aid Society, Federal Defender Services Unit, was assigned to represent him at the parole revocation hearing which, at that time, was not scheduled for a specific date.*

Petitioner initiated the present proceeding on December 21, 1973, which was heard by Judge Carter on December 27. Thereafter, while the petition was sub judice, the Parole Board scheduled a "special" parole revocation hearing for petitioner, to be held on January 4, 1974.** This hearing was later rescheduled for the next regular January session.

Judge Carter, by written opinion*** dated January 16, 1974, dismissed the petition on the grounds that petitioner's incompetence was responsible for the delay from July 2 to

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*Assistant United States Attorney Glekel stated that the Parole Board meets in the Southern District of New York on an average of once each month. However, because petitioner was not in New York when the November meeting was held, and since none was scheduled for December, the first available meeting was January 1974. (Transcript of Proceedings, December 27, 1973, at 6).

**Petitioner indicated in his letter addressed to Judge Carter and dated January 5, 1974, that the reason for not participating in the January 4 proceeding was that he did not wish to prejudice in any way the issues raised in his petition for writ of habeas corpus. He further stated, however, that he did not deny the violations.

***Judge Carter's opinion denying the petition is annexed as "B" to petitioner-appellant's separate appendix.

October 31, and that the delay after October 31 was neither unreasonable nor prejudicial since petitioner did not deny the alleged violations and declined to participate in the special revocation hearing scheduled for January 4.

The parole revocation hearing was eventually held on March 26 and 27, 1974,* at Federal Detention Headquarters in New York City, at which time petitioner, represented by assigned counsel, admitted five of the six alleged violations and chose to call no witnesses as to the ultimate disposition. The Board of Parole revoked parole until the expiration of petitioner's sentence.

STATEMENT OF POSSIBLE LEGAL ISSUES

The issue raised in the record below is whether the District Court erred in dismissing the petition on the grounds that there was no unreasonable and prejudicial delay in affording petitioner a parole revocation hearing.

It is beyond dispute that petitioner is entitled to a hearing on the issue of his parole revocation. Morrissey v. Brewer, 408 U.S. 471 (1970); Gagnon v. Scarpelli, 411 U.S. 471 (1971), and that this hearing must be conducted within a reasonably prompt time after he is taken into custody on the parole warrant. Morrissey v. Brewer, supra; Adam v. Hudspeth, 121 F.2d 270 (10th Cir. 1941).

An unreasonable delay has often been stated as any

period in excess of three months. Marchand v. Director, United States Probation Office, 412 F.2d 331 (1st Cir. 1970); Hyler v. United States Board of Parole, 447 F.2d 957 (5th Cir. 1971); Sutherland v. District of Columbia Board of Parole, 366 F.Supp. 270 (D.C. Cir. 1973) (Gesell, D.J.); Note, Parole Revocation in the Federal System, 56 Georgetown Law Journal 705, 717 (1968). However, what constitutes an unreasonable delay will vary with the facts of each case. Shelton v. United States Board of Parole, 338 F.2d 567, 574 (D.C. Cir. 1967).

As the Court below found, the period from July 2 to October 30, 1973, during which time petitioner was incompetent, and therefore unable to participate in the proceedings, is not properly part of the period of delay. Here, however, after petitioner was declared competent, the Government affirmatively committed itself at the habeas corpus proceeding in the federal court in Springfield, Missouri, to afford petitioner a hearing by November 9, 1973, and based on that representation the District Judge in the Western District of Missouri ordered that a hearing be held in New York "within the next few weeks or shortly after November 9, 1973." At the time petitioner initiated the present proceeding more than a month and a half had elapsed beyond the November deadline without a hearing. Moreover, the Government's concession of administrative error and negligence*

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*The Assistant United States Attorney for the Southern District of New York represented that the United States Attorney in Springfield, Missouri, failed to transmit to the Board of Parole in Washington, D.C., a copy of the order by

confirms that the delay here was an unreasonable one.* Therefore, the writ should have issued even absent a showing of prejudice. United States ex rel. Buono v. Kenton, 287 F.2d 584 (2d Cir. 1961); United States ex rel. Vance v. Kenton, 252 F. Supp. 344 (D.Conn. 1966).**

However, despite what petitioner considers to be a period of unnecessary delay in the revocation proceeding, the insurmountable problem here is that subsequent to filing the notice of appeal herein a hearing on the parole revocation was conducted at Federal Detention Headquarters on March 26 and 27, 1974. Petitioner attended and participated in this hearing with the assistance of counsel. Petitioner admitted five of the six parole violations and chose to call no witnesses. Moreover, petitioner did not challenge the fairness of the revocation hearing, nor did he assert that he was prejudiced by the failure to afford him a prompt hearing. Accordingly, the

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the federal judge sitting in Springfield which directed that petitioner be given a hearing in New York City "within the next few weeks or shortly after November 9, 1973." Affidavit of Assistant United States Attorney Jeffrey I. Glekel, dated January 3, 1974, at 2.

*Petitioner's failure to participate in the hastily scheduled parole hearing on January 4, 1974 (noted in Judge Carter's opinion) while the petition was sub judice should not be considered as curing the defect since petitioner was inhibited by fear of prejudicing his rights on the petition for writ of habeas corpus and thus the hearing would not have been a "fair" one. United States ex rel. Hitchcock v. Kenton, 256 F.Supp. 296 (D.Conn. 1966) (Zampano, D.J.).

**This could also be considered in terms of "mootness;" however, the result is the same. See, e.g., Marchand v. Director, United States Probation Office, supra.

issue raised in the court below has been cured* by the subsequent revocation hearing. Cotner v. United States, 409 F.2d 853 (10th Cir. 1969); Glenn v. Reed, 289 F.2d 462 (D.C. Cir. 1961); United States ex rel. Buono v. Kenton, supra.

Thus, while immediate release from custody would have been an appropriate remedy below, the subsequent parole revocation hearing has effectively remedied this defect unless petitioner can show that the delay prejudiced his right to a fair hearing. United States ex rel. Buono v. Kenton, supra. This petitioner cannot do.

CONCLUSION

For the above-stated reasons, The Legal Aid Society, Federal Defender Services Unit, should be permitted to withdraw as counsel for petitioner-appellant for purposes of this appeal.

Respectfully submitted,

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*However, even if the Court properly granted the writ below, absent a showing of prejudice this would not have precluded the Board of Parole from re-arresting petitioner and charging him with the same alleged parole violations. United States ex rel. Buono v. Kenton, supra.

I certify that I have personally served a copy of the brief herein on AUSA Clerked in the Southern District this 9th day of May 1974